

Juvenile Youthful and Serious Youthful Offender statutes need to be changed because there is no fair way to see if the Child should really be prosecuted as an adult in the beginning phase of charging a child with an adult sanctioned crime. The State always has the upper hand on choosing who to charge as an adult and the Child has no way of presenting to the Court to determine the appropriateness of adult sanctions. There is room for abuse from the DA office the way it stands now.

State Bill 7 Introduced by Senator Cisco McSorley added language to include Serious Youthful Offenders (SYO) in 2009 which was passed but then eventually vetoed. This bill was good but it also needs some language to allow the Child to question the appropriateness of the adult sanctions for the reasons before the transfer to adult district court as listed below:

http://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html?_r=0

In a 2012 case, Miller v. Alabama, the court ruled that juveniles may not receive a mandatory sentence of life without parole, because it prevents judges from considering the “hallmark features” of youth — including “immaturity, impetuosity, and failure to appreciate risks and consequences.” Recognizing that younger offenders have a greater capacity for change, the court required that judges give them “individualized” sentencing decisions and, except in extremely rare cases, a “meaningful opportunity” for release “based on demonstrated maturity and rehabilitation.”

<http://nmssc.unm.edu/reports/2012/cyfd-recidivism-report.pdf>

Section IV: Conclusions and Further Research

CONCLUSIONS

We were able to successfully track children with referrals in CYFD into the adult criminal system. By grouping individuals into informal, petition and facility samples we were able to see if the various recidivism rates varied by group. One finding remains consistent throughout the analysis. The children who were committed to a CYFD facility (the most serious outcome) had the highest rate of recidivism as adults for both having been arrested (51.6%), having a court case filing (Magistrate 39.6% and District (31.4%), and having been convicted (Magistrate 15.1% and District 21.1%). Additionally, we were able to look at the sentences in District court cases.

1. For Serious Youthful Offender (SYO) cases. Currently, there is no real check on a DA's ability to file a case as an SYO, Merely that the child is at least 15 years old, and first degree murder is alleged. You can see how this might be ripe for abuse. We think that there ought to be at least one, but better both of the following:

a. When the DA files the notice of intent to seek adult sanctions, require that in the notice the DA list all factors other than age and charge that make this appropriate to be pursued as an adult matter. The list of factors to be considered and weighted is in 32A-2-20(C). [These are the factors for (Youthful Offender) YO cases.]

b. Require that after the DA files notice of intent to seek adult sanctions, but before the case goes to grand jury, the juvenile judge hold a hearing to determine the appropriateness of pursuing the child as an adult. The factors to be considered would be those in 32A-2-20(C). The 2010 legislature nearly unanimously passed a bill requiring this, but Bill Richardson vetoed it.

2. Sealing juvenile records. Sealing of juvenile court records should be automatic when the child reaches 18. In fact, there should be expungement, not just sealing. If the DA objects to a particular child's records being expunged/sealed, the DA can file an objection, with notice to the

child AND the PD. There would be a hearing at which the DA would have to prove by clear and convincing evidence that the records must not be expunged/sealed.

It is important to remember that the New Mexico law on SYOs was enacted as a result of the great "superpredator" scare of the 90's. Wouldn't you know it -- there was no rising tide of superpredators. Big mistake. Here's a NYTimes editorial on it: http://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html?_r=0

Just for your information, this study was done by the New Mexico Sentencing Commission: <http://nmssc.unm.edu/reports/2012/cyfd-recidivism-report.pdf>

It is important to note that New Mexico's Children's Code delinquency provisions are really good, especially compared to other states. The problems essentially are institutional -- lack of adequate, good-quality programs; lack of adequate, good-quality institutions to which a child can be committed; lack of a good-quality facility that can take children and treat them until age 23 or 25; failure of DA's to take juvenile matters seriously and train their staffs appropriately; failure of the NMPD Dept. to take juvenile matters seriously and train their staffs appropriately; failure of the judges to educate themselves and treat kids with care and creativity. (The emerging science of adolescent development indicates that adolescence isn't over for males until about 25; for females, about 23. Maybe we need a new understanding of juvenile law.)

Center for Disease Control and Preventions states the

following. <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>

Summary

The independent, nonfederal Task Force on Community Preventive Services (Task Force), which directs the development of the Guide to Community Preventive Services (Community Guide), conducted a systematic review of published scientific evidence concerning the effectiveness of laws and policies that facilitate the transfer of juveniles to the adult criminal justice system to determine whether these transfers prevent or reduce violence among youth who have been transferred and among the juvenile population as a whole. For this review, transfer is defined as placing juveniles aged <18 years under the jurisdiction of the adult criminal justice system. The review followed Community Guide methods for conducting a systematic review of literature and for providing recommendations to public health decision makers. Available evidence indicates that transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth. Available evidence was insufficient to determine the effect of transfer laws and policies on levels of violent crime in the overall juvenile population. On the basis of these findings, the Task Force recommends against laws or policies facilitating the transfer of juveniles to the adult criminal justice system for the purpose of reducing violence.

PROPOSED POSSIBLE LANGUAGE CHANGES TO CURRENT STATUTES OR ADDITIONS TO STATE BILL 7 SPONSERED BY MR. MCSORLEY:

NM Stat. 32A-2-20 Disposition of a youthful offender (New Mexico Statutes (2013 Edition))

A. The court has the discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender. The children's court attorney shall file a notice of intent to invoke an adult sentence within ten working days of the filing of the petition, provided that the court may extend the time for filing of the notice of intent to invoke an adult sentence, for good cause shown, prior to the adjudicatory hearing. A preliminary hearing by the court or a hearing before a grand jury shall be held, within ten days after the filing of the intent to invoke an adult sentence, to determine whether probable cause exists to support the allegations contained in the petition.

a. When the DA files the notice of intent to seek adult sanctions, require that in the notice the DA list all factors other than age and charge that make this appropriate to be pursued as an adult matter. The list of factors to be considered and weighted is in 32A-2-20(C). [These are the factors for (Youthful Offender) YO cases.]

b. Require that after the DA files notice of intent to seek adult sanctions, but before the case goes to grand jury, the juvenile judge hold a hearing to determine the appropriateness of pursuing the child as an adult. The factors to be considered would be those in 32A-2-20(C). (The 2010 legislature nearly unanimously passed a bill requiring this, but Bill Richardson vetoed it.)

c. At any time after the filing of notice of intent to invoke an adult sentence, the Child, upon the Child's request only, may request an amenability hearing ant the Court shall grant such hearing.

NM Stat. 31-18-15.3 Serious youthful offender; disposition (New Mexico Statutes (2013 Edition))

H. **a. When the DA files the notice of intent to seek adult sanctions, require that in the notice the DA list all factors other than age and charge that make this appropriate to be pursued as an adult matter. The list of factors to be considered and weighted is in 32A-2-20(C). [These are the factors for (Youthful Offender) YO cases.]**

b. Require that after the DA files notice of intent to seek adult sanctions, but before the case goes to grand jury, the juvenile judge hold a hearing to determine the appropriateness of pursuing the child as an adult. The factors to be considered would be those in 32A-2-20(C). (The 2010 legislature nearly unanimously passed a bill requiring this, but Bill Richardson vetoed it.)

c. At any time after the filing of notice of intent to invoke an adult sentence, the Child, upon the Child's request only, may request an amenability hearing ant the Court shall grant such hearing.

NM Stat. 32A-2-3 Definitions (New Mexico Statutes (2013 Edition))

H. "serious youthful offender" means an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder. A "serious youthful offender" is not a delinquent child as defined pursuant to the provisions of this section; **unless the Child is amenable to treatment as a child.**

- **THE BOTTOM LINE IS THAT WITH THESE CHANGES, NEW MEXICO WILL LEAD THE NATION IN DOING THE RIGHT THING ON HOW JUVENILES ARE TREATED HOW THEY SHOULD BE: "LIKE JUVENILES". THE STATE SHOULD FIRST SEE IF IT IS APPROPRIATE TO BOUND OVER A CHILD INTO ADULT COURT AND NOT FIGURE THAT PART OUT LATER. THIS WILL SAVE MONEY FOR TAXPAYERS IN THE LONG RUN THAT IF YOU INVEST ON SOME REHABILITATION WHILE THE CHILD IS YOUNG, THEN THERE IS NO NEED FOR LONG TERM INCARCERATION SAVING MILLIONS. ANOTHER WAY THIS SAVES MONEY IS IT PREVENTS LAWSUITS AGAINST THE STATE FOR CIVIL RIGHTS VIOLATIONS BECAUSE OF THE "PRISON RAPE ELIMINATION ACT" WHICH IS A FEDERAL STATUTE THAT THE PURPOSE WAS TO "Eliminate sexual assault in prison".**

**FROM THE HEAD OF JUVENILE DIVISION OF THE LAW OFFICES OF THE PUBLIC DEFENDER
JASON RAE:**

YR We Waiting?

A Question of Early Determination of Amenability

"It is in the best interest of the child.. that amenability for treatment be determined as soon as possible"

- Language from Order authorizing pre-adjudication of amenability

If you practice in Juvenile Court, inevitably you will see those two dreadful letters that let us know we are playing for higher stakes. That glaring "YR" designation is an indication that things are different; that the State is no longer intending to treat your client like a child – he or she is now a Defendant. But, though things are different and just a bit more frightening, remember that the Children's Code's primary purpose is for the rehabilitation of children and that the YR designation alone does not change the fact that your client is still a child.

It is tempting to treat a case designated as a Youthful Offender like it is an adult case – to handle it the same way we handle other felony cases. It is true that we should be especially diligent in our investigation and representation of these clients because of the potentially devastating effects that a conviction may have. However, we should not forget that the Children's Code provides avenues of defense that are not available to adults. We should never forget that a finding of amenability utterly removes the ability for the state to seek adult penalties irrespective of a finding of guilt. That said, we should also be mindful that, in determining amenability to treatment, the Court will take into account the child's age as it relates to his ability to obtain services. See, N.M.S.A 1978 32A-2-20 (C)(7). So, the

longer the child we wait before placing amenability in front of the Court, the less likely it is that the child will be found amenable. The following case study best exemplifies this point. (Please note that, because the case is in juvenile court, identifying information shall be avoided.)

Recently, in Quay County, the Court was asked to make a pre-adjudication determination of amenability. The request came both from defense and from the State. The allegations against the accused child were that he participated in a double homicide. Since the child was only fourteen at the time of the killings, he was designated as a Youthful Offender. As a fourteen year old youth, it was apparent that the accused would likely be found amenable to treatment. However, the stumbling block was that the Children's Code seemingly did not allow for a child to be found amenable prior to adjudication. So, when the Court accepted the party's motion to have the Court determine amenability, CYFD filed a writ in opposition. The position of CYFD was that the determination was premature since the child not yet entered a plea or been found guilty at trial. At first glance, CYFD's position seems to be one that would prevail.

According to the Children's Code, "[Once] the child is adjudicated as a youthful offender, the court shall make [a finding as to amenability to treatment]." N.M.S.A. 1978 32A-2-20. Furthermore, the Code makes no specific provisions for a pre-adjudication determination. Thus, a strict reading of the statute would suggest that we are not able to argue for or be guaranteed a juvenile sentence until after a child has admitted and been convicted. But yet, determining whether a child is amenable is usually in the best interest of all parties. Early determination of amenability helps facilitate negotiations, negate unnecessary delay, and can avoid unneeded litigation and trials. But, most importantly, it can help your client enter into an adjudication that is focused on rehabilitation rather than punishment. The argument then is that, just because the Code outlines how amenability should be determined post-conviction, doesn't mean that the Code prohibits parties from seeking an earlier finding. Think of it this way, just because our rules of criminal procedure require that discovery be conducted within ten days of arraignment doesn't mean that the State is barred from delivering discovery pre-indicment.

Indeed, in some districts, pre-adjudication determination of amenability is done as a matter of course. In the Albuquerque and Las Cruces – for example – the judges and the state's attorneys recognize the efficiency inherent in determining which path the case is likely to travel. In these jurisdictions, defense counsel simply refers client for an evaluation and then discloses the evaluation, if favorable, to the state. Once the state recognizes that the child is likely to be deemed amenable, the negotiations then usually revolve around what type of juvenile disposition is appropriate given the facts, what can be proven, the child's history, etcetera.

Having discussed this matter with many practitioners of juvenile defense, and having handled a number of youthful offender cases myself, the process I follow is this:

1. I make an honest evaluation of the case. Will your client benefit from a quicker adjudication of amenability and is the client likely to be found amenable? If so, begin the conversation with the state.
2. If you are able and if it is necessary, hire an evaluator. Though I may use an evaluator that is contracted with CYFD, I only do so when I am certain that the child is likely to be deemed amenable. If I have some doubts – for instance if the child is older, has a lengthy history, has not done well in treatment, etc. – I will not use Court funds to pay for the evaluation. I would rather ensure confidentiality than risk the evaluation hurting my client's case. Also, consider that the Law Office of the Public Defender may be petitioned to pay for the evaluation even if child has hired private counsel.

3. I find it helpful to speak to evaluator prior to the evaluation being conducted. Since the evaluation is being conducted pre-adjudication, I explain to the evaluator that he should avoid discussing the charge at hand and avoid recording any admissions. I have found that the evaluators I use are sensitive to my client's legal position and will avoid seeking admissions.

Now, I know this isn't always going to work. I know that certain judges in certain jurisdictions will never make a finding pre-disposition if the state opposes. I know that some children's court attorneys will be just as closed minded. But, by being cognizant that it can be done and is being done, maybe someday we will change the minds of those judges and state's attorneys.

PLEASE CONSIDER CHANGING THE JUVENILE STATUTES CONCERNING JUVENILE/ADULT TRANSFERS. THESE IDEAS WILL SAVE MONEY FOR MANY REASONS CONTAINED ABOVE. SOMETIMES IT MAY SAVE MONEY BY FAST TRACKING THESE JUVENILES BACK INTO THE DELINQUENCY SYSTEM INSTEAD OF THE LENGTHY ADULT CRIMINAL PROCESS. I'VE HAD PERSONAL EXPERIENCE WITH JUVENILE CLIENTS WHO MAY BE FIRST OFFENDERS AND THEY GET INVOLVED IN A FIGHT WHERE A HOMICIDE OCCURS. THE CHILD IS 16 YEARS OLD AND BOUND OVER AS AN ADULT. THE TYPICAL HOMICIDE CASE CAN TAKE UP TO 3 YEARS AND BY THE TIME DISPOSITION OF THE CASE OCCURS AND THE AMENABILITY STUDY RECOMMENDS THE PERSON BE TREATED AS A JUVENILE, THEN IT'S TOO LATE BECAUSE THERE ARE NO FACILITIES TO TREAT THEM.

Respectfully submitted,

Rick Abeyta

LOPD Capital Crimes Investigator